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No. 150

In the SUPREME COURT OF THE UNITED STATES

No. 16,720.

WILLIAM A. WEGMANN,
Petitioner,

vs.

NICKOLAS MANNINO et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

HOWARD P. RIVES,
First Federal Building,
Clearwater, Florida,
As Attorney for Petitioner.

R. L. MERRIHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

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In the
SUPREME COURT OF THE UNITED STATES

No. 16,720.

WILLIAM A. WEGMANN,
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vs.

NICKOLAS MANNINO et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The Petitioner, William A. Wegmann, through the undersigned attorneys, prays that a Writ of Certiorari be granted by the above court to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit dated April 2, 1958, the same being an affirmance of a certain final judgment entered by the United States District Court in and for the Southern District of Florida and filed March 14, 1957.

OPINIONS BELOW.

The final judgment of the District Court appears in Appendix (page A12), and the opinion of the United States Court of Appeals is set forth in Appendix (pages A2-A10) of this petition. To the best of Petitioner's knowledge and belief the said opinions and judgments of the lower courts are unreported at this time.

JURISDICTION.

Petitioner invokes the jurisdiction of this court pursuant to 28 U.S.C.A. 1254 (1) and respectfully shows that Federal jurisdiction of the cause was originally invoked by the Respondents upon diversity of citizenship and an amount in controversy of more than Three Thousand Dollars ($3,000.00).

Petitioner would further show that the opinion and judgment of the law as decided by the courts below is contrary to the decisions of the highest court of the State of Florida to-wit: the Supreme Court of Florida, and that said questions presented by this Petition are of vital local application and should now be settled by this court.

QUESTIONS PRESENTED.

The questions presented by this Petition involve the interpretation of a contract made within the State of New Jersey for performance within the State of Florida and are presented as follows:

1. Must a United States District Court and Circuit Court of Appeals follow rules for the construction of writ-

ten contracts as adopted by the highest court of the state wherein the cause of action accrued.

2. Should the courts of Federal jurisdiction in applying local statutes to specific contractual dealings be bound by the interpretations of the highest court of a state as to the legal effect of certain conduct or contractual dealings of the parties.

3. Where the highest court of a state has not directly decided the specific point or question involved in the interpretation of the statutory law of the state but has tacitly recognized a construction by its decisions in cases similar in point of fact, should the federal courts be bound by the tacit recognitions of the state courts.

STATEMENT OF THE CASE.

Plaintiff-Petitioner, William A. Wegmann, entered into a certain contract in the State of New Jersey on or about February 27, 1954, which as its first document contained the writing annexed to Plaintiff's original Complaint as Exhibit "A", and subsequently made with the Defendants' modifications to the basic contract in the form of Exhibits "B" and "C". The actual contract upon which the cause of action rests is based upon the entire contractual documents which, interpreted together, now constitute the contract of the Appellant before this court. Alleging a breach of the contractual agreement by the Defendant-Respondent, Petitioner filed his Complaint in the Circuit Court of the Sixth Judicial Circuit in and for Pinellas County, Florida. Upon Removal Petition filed by the Defendants, the cause was removed to the United States District Court for the Southern District of Florida.

Upon trial of the case on its merits the court found at the conclusion of the Plaintiff's case that a *prima facie*

case had been proven; however, in response to a motion of the Defendant the court found that Petitioner was not entitled to recovery in that the lower court construed Exhibit "A" to be a contract requiring the Plaintiff to sell real property in contravention of Section 475.01 of the Florida Statutes and ruled that the contract was therefore invalid and unenforceable under and by virtue of the terms of Section 475.41 of the Florida Statutes, both of which sections are quoted at length, Appendix (pages A3 and A4) (the same being footnotes to Opinion of Circuit Court of Appeals on pages numbered A3 and A4).

From the adverse ruling of the District Court, Petitioner perfected his appeal to the United States Court of Appeals for the Fifth Circuit and thereupon the judgment was affirmed in the Opinion of said court dated April 2, 1958 (Appendix, page A11). Petitioner on May 9, 1958, filed a Petition for rehearing and brief in support thereof which was denied by order of the court in due course wherefore Petitioner moved for an order staying the mandate in this cause which order was duly granted on June 3, 1958.

REASONS FOR GRANTING THE WRIT.

Petitioner in the cause respectfully shows unto the court that the District Court and the Circuit Court of Appeals have each failed to recognize a basic premise of the laws of the State of Florida to the effect that a contract is to be construed in its entirety and that therefore the position of the courts below in failing to recognize that the contract of the parties actually consisted of three documents was error.

The Florida court has evidenced its decisions regarding interpretation of contracts in the following citations which Petitioner abbreviates to a minimum in the interest of space and this court's time:

"Courts are not authorized to write a new contract for the parties on the pretext of construing the terms thereof when the wording employed is plain, crystal clear and unambiguous."

Voelker v. *Combined Insurance Company of America*, 73 So. 2d 403, 408 (Florida 1954).

In the case of *South Florida Amusement and Development Company* v. *Blanton*, 116 So. 869, the court held:

"Name and nature of instrument depends on intention of parties; intention of parties to instrument must be gained from its entire contents in light of instruments affecting it; name given to instrument by parties is not controlling unless it squares with intention as expressed in instrument body."

In *Townsend et ux.* v. *First Federal Savings and Loan Association*, 15 So. 2d 199-200 (Florida), the court said:

"It is a fundamental rule of construction that the meaning of any writing is not to be collected from any particular expression, but from a general view of the whole writing; all of its parts are to be compared, used and construed with reference to each other."

In 5 Florida Law and Practice Contracts, Section 66, page 43, there are the concise statements amply supported by abundant Florida citations to the effect that interpretation of a contract should not be made from particular provisions or disjointedly nor from isolated phrases without reference to the agreement as a whole.

In the case of *Pensacola Gas Company* v. *Lotze*, 2 So. 609, decided June 15, 1887, the Florida court held:

"One part of an agreement may be resorted to to explain the meaning of language or expressions of another part."

(Head note 2, Syllabus by the court.)

Petitioner in the case at bar respectfully shows that it is apparent upon the face of the Opinion both of the District Court and from that of the Circuit Court of Appeals that no credence or effect whatsoever was accorded by either court to the basic principles of interpretation and the written modifications Exhibits "B" and "C" (Appendix, pages A17-A18). It is further apparent that the court at all times adopted the view that the only contract of the parties was contained in Exhibit "A" in clear contravention of the decisions of the Supreme Court of Florida and especially those heretofore cited.

It is significant to note that neither Petitioner nor Respondents below have found any cases decided by the Supreme Court of Florida directly construing Sec. 475.01 of the Florida Statutes. The principal interpretations of Section 475 had involved the constitutionality of said statute as a whole which decision had been rendered by the Florida court in *State ex rel. Davis* v. *Rose,* 122 So. 225. On two occasions the statute in question had been dealt with by the federal courts but neither of said decisions are in point as to the facts of the case and are therefore omitted at this time.

As set forth in the second question a premise raised by this Petition deals with the decision of whether the Federal Courts should be bound by construction and recognition of similar contracts and similar circumstances between litigants wherein the court of the state has tacitly recognized a statutory construction. Specifically in the case at bar Petitioner without avail cited unto the Circuit Court, both in his initial brief and again in his Petition for rehearing, a parallel case to the cause at bar founded upon similar dealings but wherein actual construction of Chapter 475 of the Florida Statutes was not raised. The specific case was that of *Russell* v. *Thielan,* 82 So. 2d 143

(Florida), which was decided by the Florida court on June 29, 1955. It is a position of the Petitioner here that it was so obvious to the Florida court that "development contracts" and "joint venture" contracts do not fall within Chapter 475 of the Florida Statutes, that the point was not raised. On page 8 of the Petition for Rehearing filed by Petitioner with the Circuit Court of Appeals, Petitioner quoted the Florida court as its observations in this regard which are taken from the court's Opinion as published in 82 So. 2d 143, 144:

> "Thielan and Thierry being 'real estate developers' had no license to sell real estate for other owners and apparently for this reason the parties executed an option agreement."

The above cited case as in the case at bar involved the development of Florida real property for sale under a circumstance and agreement whereby one party was to furnish development skill and know-how and the other party was to furnish capital and land. Development in the case at bar included laying and platting of lots; installation of water and sewer; supervision of laying out and paving of streets, all of which services were performed as found by the judgment of the lower court. The Florida court in the Thielan case on page 145 of the text quoted and cited at length numerous authorities which are omitted here for sake of brevity. The essence of the court's view in announcing the law of Florida is summarized from a quotation, 48 C.J.S., Joint Adventures, Section 3, to-wit:

> "A joint venture is founded entirely on contract which may be either express or implied in whole or in part from the acts and conduct of the parties or the construction which the parties give to the contract between them."

After the omitted citations the Florida court concluded that the Thielan and Thierry agreement of owners contributing property and the developers contributing sales know-how and experience satisfied the test of joint venture.

In the case at bar not only are all of the tests of joint venture present as required by the Thierry case but in addition to that the Petitioner here actually was obligated to contribute personal moneys.

It is the simple position of this Petitioner that under a joint venture agreement the Petitioner specifically came within a recognized exception of Section 475.01 of the Florida Statutes in that he had an "ownership in the subject matter" and was therefore selling property in which he was jointly interested as a part of the adventure which position is certainly tacitly approved by the Supreme Court of Florida in the Thielan case.

Throughout the appellate proceedings of this cause it has always been and is now the prime position of this Appellant-Petitioner that the statute in question did not apply under any circumstances to the contracts of these parties for the reason that Exhibit "B", an integral part of this contract (Appendix, page A17) was specifically designed by the parties to comply with Section 475.01 of the Florida Statutes which contains the expressed exception as follows:

> "* * *; nor shall said terms be applied to one officer of every corporation engaged in the sale of its own properties who shall be its president unless otherwise provided in its charter or by-laws."

The third paragraph of Exhibit "B" provided as follows:

> "This corporation, after doing certain improvements, etc., to said land is to sell the land in the form of lots to private individuals and, in accordance with

a certain agreement existing between the aforementioned A. B. C. Excavating Company and myself, I am to be paid a certain percentage of the profit that is made from the sale of said property."

Considering the above quote and the plain language of the parties to the effect that the corporation was to sell, Petitioner Wegmann as President of said corporation specifically could sell for the Company. Petitioner was not being paid commissions from the sales but positively a "percentage of the profit" as stated in quote above. Appellant-Petitioner here is irrevocably driven to the conclusion that the United States District Court and the Court of Appeals have each failed to recognize and follow paramount rules for contract construction; said Courts have misapplied local statutes and have ignored the recognition of conduct by parties specifically approved by the state courts contrary to the pronouncements and former judgments of this court so clearly stated in the case of *Erie Railroad* v. *Thompkins*, 304 U.S. 64, 82 L.Ed. 1188. It is not the position of this Petitioner that the federal judiciary should be compelled to sift through a haystack to ascertain local law; however, neither should the courts of the federal judiciary revert to the rule of *Swift* v. *Tyson*, 16 Pet. (U.S.) 1, 10 L.Ed. 865, when local law is clearly presented.

CONCLUSION.

In conclusion Petitioner respectfully shows that this court should take cognizance of a matter of vast local importance to the entire State of Florida which is now an area of rapid development. Numerous persons having development skill and know-how are vitally linked with capital interest within and without the State of Florida to pursue this development trend. Especially should this court

adhere to the reasonable interpretations and inferences to be drawn from *Erie Railroad Company* v. *Thompkins* and instruct the Court of Appeals to follow the rules of construction as announced by the highest court of the State of Florida and to remand the cause for a new trial upon its merits.

Respectfully submitted,

HOWARD P. RIVES,
First Federal Building,
Clearwater, Florida,
As Attorney for Petitioner.

Order Staying Mandate Filed June 3, 1958.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

WILLIAM A. WEGMANN,
Appellant,
vs.
NICHOLAS MANNINO ET AL.,
Appellee.

No. 16,720.

On Consideration of the Application of the Appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It Is Ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 3rd day of June, 1958.

/s/ ELBERT P. TUTTLE,
United States Circuit Judge.

Opinion of the United States Court of Appeals, for the Fifth Circuit.

IN THE UNITED STATES COURT OF APPEALS,
FOR THE FIFTH CIRCUIT

No. 16,720.

WILLIAM A. WEGMANN,
Appellant,

VERSUS

NICHOLAS MANNINO ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

(April 2, 1958.)

Before HUTCHESON, Chief Judge, and BORAH and TUTTLE, Circuit Judges.

TUTTLE, Circuit Judge: This is an appeal from a judgment dismissing appellant's suit for specific performance of a contract involving the development and sale of a subdivision on the ground that appellant had failed to register as a real estate broker under the Florida law.

In his brief here appellant does not dispute the legal conclusion that if his contract required him to perform acts which under the Florida statute would make him a real estate broker, then the contract would be void. Both parties proceed on the assumption that the failure of a person who engages in such activities without obtaining a broker's license is denied the right to recover

compensation earned by the doing of such prohibited acts. This is doubtless due to the express terms of the statute making such commissions uncollectible and also to a recognition by appellant as well as appellees that the real estate brokers' statute is designed to effectuate an important public policy in Florida that would place real estate brokers under the strictest possible regulation; that only qualified persons of good character should be permitted to qualify; and that the public interest requires that violations of the statute be penalized not only as criminal acts of the misdemeanor class, but also by a forfeiture of the commission. That this is a proper exercise of the police power of the state has been expressly held by the Florida Supreme Court in *State ex rel. Davis* v. *Rose*, 97 Fla. 710, 122 So. 225.

Appellant does not cite a single Florida case to aid us in determining whether his contract is a contract which requires him to perform the acts of a real estate broker. We must therefore look to the exact terms of the agreement and compare them with the language of the statute.[1]

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[1]Applicable Portions of Section 475.01, Florida Statutes:

"(1) This chapter may be referred to in any legal proceeding as the 'Real Estate License Law.'

"(2) Every person who shall, in this state, for another, and for a compensation or valuable consideration directly or indirectly paid or promised expressly or impliedly, or with an intent to collect or receive a compensation or valuable consideration therefor, appraise, auction, sell, exchange, buy or rent, or offer, attempt or agree to appraise, auction or negotiate the sale, exchange, purchase or rental of any real property, or any interest in or concerning the same, including mineral rights or leases; or who shall advertise or hold out to the public by any oral or printed solicitation or representation that such person is engaged in the business of appraising, auctioning, buying, selling, exchanging, leasing or renting real estate, or interests therein, including mineral rights or leases, of others; and every person who shall take any part in the procuring of sellers, purchasers, lessors or

The complaint alleged that appellant and appellees had entered into a contract under the terms of which the appellees were to purchase 68 acres of land, and appellant, "as agent" was to perform the following services:

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lessees of the real property, or interests therein, including mineral rights or leases, of another; or who shall direct or assist in the procuring of prospects, or in the negotiation or closing of any transaction which does, or is calculated to, result in a sale, exchange, or leasing thereof, and who shall receive, expect, or be promised any compensation or valuable consideration, directly or indirectly therefor; and all persons who are members of partnerships or officers or directors of corporations engaged in performing any of the aforesaid acts or services; each and every such person shall be deemed and held to be a 'real estate broker' or a 'real estate salesman,' as hereinafter classified, unless said person when performing the act or acts herein specified shall be acting as an attorney-in-fact for the purpose of the execution of contracts or conveyances only, or as an attorney-at-law within the scope of his duties as such, or when acting as the administrator, executor, receiver, trustee, or master under or by virtue of an appointment by will or by order of a court of competent jurisdiction, or as trustee under a deed of trust, or under a trust agreement, the ultimate purpose and intent whereof shall be charitable, philanthropic, or providing for those having a natural right to the bounty of the donor or trustor; nor shall the term broker or salesman be applied to a person who shall deal with property in which he is a part owner, unless said person shall receive a larger share of the proceeds or profits from the transaction than his proportional investment therein would otherwise justify, such excess share being directly or indirectly the result of the service of buying, selling, exchanging or leasing said property; nor shall said terms be applied to one officer of every corporation engaged in the sale of its own properties who shall be its president unless otherwise provided in its charter or by-laws, if said corporation shall not otherwise be classed as a real estate broker or a salesman.

* * *"

Applicable portions of Section 475.41, Florida Statutes:

"No contract for a commission or compensation for any act or service enumerated in subsection (2) of 475.01 shall be valid unless the broker or salesman shall have complied with this chapter in regard to registration and renewal of the certificate at the time the act or service was performed."

"1. Immediately after the land is purchased, the Agent will have the land laid out into lots, the size of which will be designated by the Owner. All surveys, water, sewer, and street improvements will be made at the direction and supervision of the Agent.

"2. Upon the completion of the surveys the Agent will set up a field office, employ suitable help, salesmen, or brokers, set up signs, advertise and sell the lots; all of the expenses for the items set forth in this paragraph shall be paid for by the Agent.

"3. All costs for surveys, sewer, water, plotting out lots, and streets will be paid for by the Owner as they accrue.

"4. The Owner shall set the prices for all lots, down payments required, and terms of sale and said prices shall continue to be in effect until the total price of the land is paid for by the Owner. When the total price of the land is paid for, the prices shall be set by the mutual consent of the parties.

"5. All agreements of sale, contracts and forms will be prepared by the Owner and used by the Agent.

"6. The Agent shall immediately upon the sale of the lots send copies of all papers pertaining to said sale together with any and all moneys received to the Owner; and the Agent hereby agrees to allow the Owner to inspect and examine any and all records or papers pertaining to the business.

"7. The Agent agrees to personally or through qualified representation perform all of the duties and obligations of this agreement during the term thereof, which shall continue until all of the lots are sold, and *shall be personally responsible for the operation and conduct of the business of selling, supervising, and*

performing the obligations of this agreement until completion."[2] (Emphasis added.)

Appellant makes five contentions in assigning error to the judgment of the trial court:

"1. That the Court erred in finding that the contract between the Appellant and the Appellees violated Section 475.01 of the Florida statutes and was voided and unenforceable under prohibition of Section 475.41.

"2. The Court erred in failing to find that the terms of said contract were sufficient to show an agreement of Joint Venture.

"3. The Court erred in ruling that Appellant was barred as a matter of law from recovery for services rendered and performed other than sale or sales supervision.

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[2]Other provisions of the contract that are of significance are:

"8. The Agent will be paid a total of 25% of the Net Profit of the Owner. Net profit shall be that amount of money made by the Owner after deducting the cost of the land, survey expenses, fees, taxes, interest on mortgages, cost of installing water, sewer and street improvements, conveyancing expenses.

* * *

"10. If the agent breaches any of the conditions or obligations of this agreement, or *does not operate and supervise the sale of the lots* in a diligent manner, the Owner may immediately discontinue the services of the said Agent and the Agent shall forfeit any and all moneys which may be due him for lots already sold, or about to be sold, and the Owner shall retain said moneys as liquidated damages. This will not preclude the owner from recovering from the Agent any other actual damages sustained by him (Emphasis added).

"11. The Agent will at all times operate the business in accordance with the Laws of the State of Florida and the local rules and regulations as prescribed.

"12. This agreement and its performance shall not be held or construed, as to either party, to be, or to constitute an agency agreement, in any manner, or respect, except that

"4. The Court erred in failing to find that Appellant's contract was sufficient to show an ownership in the property, thereby making said contract an exception to Section 475.01 of the Florida statutes.

"5. The Court erred in denying unto Appellant a Quantum Meruit Recovery and Equitable Relief."

First, as to the first contention, as we have stated above, appellant impliedly recognizes that if the contract between appellant and appellees violated Section 475.01 of the Florida Statutes, it would be void and unenforceable. In his complaint appellant alleges that he had partially complied with his obligations under the contract and that "during the period of *plaintiff's development and sales effort* lots in Harbor View Villas subdivision have been sold by him in the aggregate amount of approximately $25,000." (Emphasis added.) Upon the trial of the case below the plaintiff introduced evidence which the court said "established his cause of action * * * sufficiently to

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the agent shall be authorized to perform the duties and obligations herein contained and the Agent warrants that he will not exceed any of the authority herein contained.

"13. The agent shall for all expenses incurred in advertising and operation of his office on or off the premises contract all bills in his own name and shall so advise all persons he associates with for these puurposes.

"14. The Owner cannot hire or employ any other Agent, salesman or broker to sell, manage, or perform in the operation of the business so long as the Agent herein performs all of the duties and obligations of this agreement.

"15. The Owner shall have the right to sell, transfer, or assign any of its right, title, or interest respecting the land or profits or any interest under this agreement. The Agent shall have the right to sell, transfer, or assign any of his right, title or interest respecting the land of profits or any interest under this agreement. However, the Agent shall not have the right to assign or transfer any of his duties and obligations to perform the service as set forth and designated in this agreement."

shift the burden to the defendants to show plaintiff's failure to perform or a breach by the plaintiff of the conditions of the agreement so as to preclude the summary dismissal of his complaint." The court thereupon found, however, that "the services required of plaintiff under the agreement are for those acts or services enumerated in subsection 2 of Section 475.01, Florida Statutes, which are rendered invalid by Section 475.41, Florida Statutes, unless the plaintiff shall have complied with * * * (Chapter 475, Florida Statutes)" in that he had not registered either as a real estate broker or salesman.

We think it plain that this finding by the trial court is correct in that it is clear that appellant did "for a compensation or valuable consideration directly or indirectly paid or promised" agree to "sell * * * offer * * * or negotiate the sale of any real property" and "advertise or hold out to the public * * * that he (was) engaged in the business of * * * selling * * * real estate * * * of others." And further that he agreed to "direct or assist in procuring of prospects, or the negotiation or closing of * * * transaction(s) which does or is calculated to result in a sale, exchange or leasing thereof." It furthermore appears that the compensation which appellant was to receive under his contract was for the performance of such services and that under the terms of Section 475.41 no such contract for compensation is valid.

The fact that appellant was permitted to hire salesmen and brokers who themselves might be legally licensed persons does not change the fact that his entire contract was to supervise and control the subdividing, advertising and selling of a subdivision which the statute prohibited to all but licensed persons.

The second and fourth grounds for appeal are considered together. Appellant contends that the Court erred

in failing to find that the terms of the contract were sufficient to show an agreement of joint venture. If the contract could be construed as constituting the parties joint adventurers this would not of itself avail appellant anything, because the statute makes no exception as to joint ventures as such; but, says appellant, if this is a joint venture, then this would make appellant an "owner" of the property and an owner is exempt under Section 475.01, *supra* footnote 1. We think there is no magic in the term "joint venture." This may or may not be one. but whether it is or not is not decisive of anything. No case is cited to the effect that every joint venture as to the sale of real estate makes of the joint venturers joint owners of the real estate. Such a contention must not only be made but it must be supported if appellant is to have any comfort from it. The only case cited by appellant on this point is *Bowling v. National Convoy & Trucking Co.*, 135 So. 541, which deals only with an agency coupled with an interest. This has no bearing on whether appellant at the time he performed the acts was "a person who shall deal with property in which he is a part owner" as contemplated by the statute.

The two remaining contentions are that the court should have construed the contract as a lawful agreement to do he things he could do without a broker's license even though other acts were illegal and that in any event he should be permitted to recover on a quantum meruit. The weakness of this contention is indicated in that appellant refers us to no Florida case that supports the theory that such a contract can be broken into its legal and illegal parts. He cites *Lee* v. *Craigs*, 5 Cir., 56 F.2d 785, for the proposition that:

> "When one who has obtained the benefit of an agreement invokes the defense of illegality, the Court

> will not allow the defense unless the public interest involved in the asserted ground of defense outweighs the principle that one who has obtained the benefits of an agreement should not escape its burdens."

Reference to this case shows that it is not applicable because we there stated:

> "There is no Florida statute which denounces as illegal contracts like the one pleaded."

Such is not the case here. The statute expressly prohibits what the appellant here undertook to do and provides criminal sanctions for violating the prohibition. No part of such a contract can be the basis of a cause of action since the agreement here was indivisible in that it is impossible for the court to find that any part of the agreement would remain if the illegal part were to be stricken. So, too, as to the quantum meruit. Appellant was given credit by the appellees in their counterclaim on appellant's promissory note for out-of-pocket outlays made by him. All other claims based on services rendered were part and parcel of the prohibited carrying on of the duties of a broker, and could not be the basis of a recovery.

The judgment is AFFIRMED.

A true copy.

Test:

/s/ Edward W. Wadsworth,
Clerk, United States Court
of Appeals, Fifth Circuit
New Orleans, Louisiana.

(Seal)

Judgment of United States Court of Appeals, for the Fifth Circuit.

Extract from the Minutes of April 2, 1958.

No. 16720.

WILLIAM A. WEGMANN,
Versus
NICHOLAS MANNINO ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, William A. Wegmann, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Judgment of the United States District Court in and for the Southern District of Florida.

No. 2,802 Civ. T.

M'Filmed Roll No. 4

William A. Wegmann, Plaintiff,

Versus

Harbor View Villas, Inc., et al., Defendants.

This cause having heretofore come on for trial before the Court without a jury, and the Court being fully advised in the premises DOTH FIND AND ADJUDGE:

FINDINGS OF FACT

On February 27, 1954 the defendant, A. B. C. Excavating Company, Inc., a New Jersey corporation, entered into a written agreement with plaintiff, William A. Wegmann of Camden, New Jersey, as appears from a copy of said agreement attached to the Complaint as Exhibit A; under part I of the agreement it was contemplated that A. B. C. Excavating Company, Inc., would purchase a certain tract of land consisting of 68 acres located near Dunedin, Florida and the contract provided that immediately after the land was purchased, Wegmann would have the land laid out into lots and would supervise the survey of the land and the installation of water, sewer and street improvements to be paid by A. B. C. Excavating Company; that upon the completion of the surveys or platting of the land into lots, Wegmann would set up a field office, employ suitable help, salesman, agents, or brokers, set up signs, advertise and sell the lots, the expense of which was to be paid by Wegmann. Title to the property was acquired by A. B. C. Excavating Company on or about March 3, 1954, and shortly thereafter Wegmann entered upon the performance of his obligations under part I of

the agreement until he was notified of his discharge on or about May 27, 1955, at which time he was advised by the defendants that he had breached the aforesaid agreement and that the defendants would not be further bound thereby. Part II of the agreement contemplated that when the plaintiff Wegmann paid to the defendant, Nicholas Mannino, an agreed indebtedness of $20,000 represented by a promissory note dated December 28, 1953, the proceeds of such payment would be used to provide capital for the erection of two sample houses on the lands to be developed, but the pleadings and proof disclose that that indebtedness was never paid and consequently part II of the agreement was never activated.

Upon the conclusion of plaintiff's testimony, the defendants moved the Court for a judgment of dismissal predicating such motion (among others) upon the grounds stated in the defendants' second defense, namely, that the relief sought by Wegmann was based upon the agreement of February 27, 1954, and subsequent modifications thereof which required Wegmann to render the defendants services as a real estate broker or salesman and that such agreement was not enforceable by Wegmann and was invalid under Section 475.41, Florida Statutes, for the reason that Wegmann, at the time his alleged services were performed, had not registered as a real estate broker or salesman as required by the Florida Real Estate License Law (Chapter 475, Florida Statutes) so as to permit him to act as an active real estate broker or salesman.

The plaintiff by his proof established his cause of action under part I of the agreement sued upon sufficiently to shift the burden to the defendants to show plaintiff's failure to perform or a breach by the plaintiff of the conditions of the agreement, so as to preclude the summary dismissal of his complaint. However, the Court finds that the

services required of plaintiff under the agreement are for those acts or services enumerated in sub-section (2) of Section 475.01, Florida Statutes, which are rendered invalid by Section 475.41, Florida Statutes, unless the plaintiff shall have complied with the "Real Estate License Law" (Chapter 475, Florida Statutes) in regard to registration and renewal of certificate of registration as a real estate broker or salesman at the time the act or service was performed. Plaintiff admitted that he had not complied with Chapter 475, Florida Statutes, in that he had not registered either as a real estate broker or real estate salesman under the provisions of Chapter 475, Florida Statutes.

Part I of the agreement provided that Wegmann, immediately upon the sale of the lots, should send copies of all papers pertaining to the sales, together with any and all moneys received, to the owner, and further that Wegmann should be personally responsible for the operation and conduct of the business of selling, supervising and performing the obligations of the agreement until the same was completed and would at all times operate the business in accordance with the laws of the State of Florida and the local rules and regulations as prescribed, and that Wegmann would contract all bills in his own name for all expenses incurred in advertising and for the operation of his office on or off the premises. The agreement further provided that the owner could not hire or employ any other agent, salesman or broker to sell, manage or perform in the operation of the business so long as Wegmann performed all of the duties and obligations assumed by him under the agreement, Wegmann binding himself to operate and supervise the sale of the lots in a diligent manner and to otherwise comply with the provisions of the agreement.

In addition to the defenses filed by the defendants, the defendant, Nicholas Mannino, filed his counterclaim against the plaintiff, William A. Wegmann, upon Wegmann's $20,000 note payable to Mannino two years after December 28, 1953, less certain agreed credits thereon disclosed by the pleadings and the net amount due on said note for principal and interest was not disputed.

CONCLUSIONS OF LAW

It is the opinion and judgment of the Court that the commissions or compensation payable to plaintiff under part I of the agreement sued upon are for services as a "real estate broker" or a "real estate salesman" within the meaning of Section 475.01 (2), Florida Statutes, and plaintiff having failed to comply with Chapter 475, Florida Statutes, in regard to registration or renewal of a certificate as a real estate broker or salesman, the contract sued upon for a commission or compensation is invalid by virtue of the provisions of Section 475.41, Florida Statutes.

JUDGMENT

It is, therefore, ORDERED, ADJUDGED AND DECREED:

1. The complaint of William A. Wegmann be and the same is hereby dismissed, and the Notice of Lis Pendens recorded on April 9, 1956 in Lis Pendens Book 25, Page 89 in the office of the Clerk of the Circuit Court of Pinellas County, Florida, be and the same is hereby cancelled and discharged, and the Lis Pendens filed in this cause is also cancelled and discharged.

2. The Clerk of this Court shall refund to the defendants or their solicitor of record, all moneys deposited in the registry of this Court pursuant to "Order Providing Method for Discharge of Notice of Lis Pendens"

dated May 18, 1956, and shall likewise refund to the defendants or their solicitor of record the sum of $250.00 cash deposited in the registry of this Court on August 5, 1955 as surety for plaintiff's removal bond.

3. That the defendant, Nicholas Mannino, do have and recover from the plaintiff, William A. Wegmann, on said defendant's counterclaim against William A. Wegmann, the sum of Ten Thousand Two Hundred Forty-five and 83/100 Dollars ($10,245.83) for which execution may issue.

4. That all taxable costs shall be assessed against the plaintiff and the defendants equally.

ORDERED, ADJUDGED AND DECREED at Tampa, Florida, this 12 day of March, 1957.

(Signed) GEO. WHITEHURST UNITED STATES DISTRICT JUDGE.

Exhibit B.

In accordance with our mutual understanding, you are the owner of A.B.C. Excavating Company, who holds title to a plot of ground in Dunedin, Florida known as Harbor View Villas.

Title to the aforementioned property is being transferred from A.B.C. Excavating Company to you personally and thence from you, personally, to a New Jersey corporation known as Harbor View Villas, Inc.

This corporation, after doing certain improvements, etc. to said land is to sell the land in the form of lots of private individuals and, in accordance with a certain agreement existing between the aforementioned A.B.C. Excavating Company and myself, I am to be paid a certain percentage of the profit that is made from the sale of said property.

Now this is to certify that our mutual understanding is that I am to wait for my percentage of the profit until such time as the aforementioned Harbor View Villas is sold to individual buyers.

It is further mutually agreed upon by you and I that the original percentage of commission or remuneration to be received by me shall be based upon the original cost of the ground of $175,000.00, plus the cost of engineering, dredging, grading, excavating, street surfacing or paving and conveyancing. When these costs are all accumulated into one total, that total is to be deducted from the accumulated sales of the aforesaid Harbor View Villas and, the difference between those two figures is the figure to be used in computing the percentage which is to be paid me for my services rendered, all of which, we, the undersigned, agree and certify.

(Signed) William A. Wegmann
(Signed) Nicholas Mannino
/s/ Leonard A. Spector

Exhibit C.

April 7, 1955

Mr. Nicholas Mannino:

Dear Sir:

In confirmation of our verbal understanding as of 4-5-55 and 4-6-55, in compliance with your request that Harbor View Villas be listed with brokers in adjacent cities to Dunedin, Fla. and including Dunedin, Fla. and in accordance with your desire to pay brokers a commission in excess of the 5% which is the allowance made in my contract with you and or A.B.C. Excavating in and agreement made between us on the 27th day of February 1954, wherein and therewith you are excluded from making any agreement with any other individual pertaining to the development or sale of lots or any other part thereof it is mutually agreed between us herewith that you employ the assistance of such brokers and pay them commission or bonuses up to 15% with the expressed understanding than any commission or bonus paid to any such broker in excess of 5% will be charged to the general developing expense of Harbor View Villas development and not as a direct charge against my renumeration which I am to receive out of the profits made from the development of Harbor View Villas Subdivision.

The above is hereby agreed upon by:

(Signed) Nicholas Mannino
(Signed) W. A. Wegmann

Witness
/s/ Leonard A. Spector

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Office - Supreme Court, U.S.
FILED
JUL 28 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1958

No. 150

WILLIAM A. WEGMANN,
Petitioner,

vs.

NICHOLAS MANNINO, et al,
Respondents

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Wm. C. McLean
707 Florida Avenue
Tampa, Florida
Attorney for Respondents

Supreme Court of the United States

OCTOBER TERM 1958

NO. 150

WILLIAM A. WEGMANN,
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vs.

NICHOLAS MANNINO, et al,
Respondents

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

Petitioner only cites 28 U. S. C. A. 1254 (1) to sustain jurisdiction. There is no statement to show the nature of the case and rulings of the Court were such as to bring the case within the jurisdictional provisions relied on, nor does Petitioner cite any cases to sustain jurisdiction.

Petitioner states that the rulings of the Court were contrary to the decisions of the Supreme Court of Florida, but Petitioner does not demonstrate that conclusion.

Petitioner fails to include a statement of the ground upon which it is contended that the questions involved are substantial.

Therefore, the Petition does not comply with the requirements of Rule 23 and by virtue of that rule such failure is "a sufficient reason for denying his petition."

QUESTIONS PRESENTED

Respondent is unable to find in the opinion of the Circuit Court any warrant for the questions here presented; but on the other hand, the Court very clearly enumerated the Petitioner's five contentions assigned as error (A 6).

In discussing the only assignment of error which would even remotely warrant the questions presented, the Circuit Court in its opinion said (A 9):

> "The weakness of this contention is indicated in that appellant refers us to no Florida case that supports the theory that such a contract can be broken into its legal and illegal parts. . . .
>
> "The statute expressly prohibits what the appellant here undertook to do and provides criminal sanctions for violating the prohibition. No part of such a contract can be the basis of a cause of action since the agreement here was indivisible in that it is impossible for the court to find that any part of the agreement would remain if the illegal part were to be stricken. So, too, as to the quantum meruit."

STATEMENT OF THE CASE

A succinct statement of the case will be found in the judgment appealed from (A 12) and the Circuit Court amplified this statement in its opinion (A 2) and cites the applicable Florida Statutes in a foot note (A 3, A 4).

REASONS FOR GRANTING THE WRIT

Petitioner has not demonstrated the existence of any reason for granting the writ. He shows no conflict of decisions. The case appears to be of no importance except to the litigants involved.

Petitioner contends that the District and Circuit Court failed to construe a contract in its entirety. It does not follow that this, if true, demonstrates that the Court of Appeals has decided an important state question in a way in conflict with applicable state law. There is no plain showing of error. The Circuit Court said:

> (1) "Appellant does not cite a single Florida case to aid us in determining whether his contract is a contract which requires him to perform the acts of a real estate broker. We must therefore look to the exact terms of the agreement and compare them with the language of the statute. (A 3)
>
> * * * * * * * *
>
> "The Court thereupon found, however, that 'the services required of plaintiff under the agreement are for those acts or services enumerated in subsection 2 of Section 475.01 Florida Statutes, which are rendered invalid by Section 475.41 Florida Statutes, unless the plaintiff shall have complied with * * * (Chapter 475, Florida Statutes)' in that he had not registered either as a real estate broker or salesman. (A 8).
>
> "We think it plain that this finding by the trial court is correct . . .

(2) "We think there is no magic in the term 'joint venture'. This may or may not be one, but whether it is or not is not decisive of anything. No case is cited to the effect that every joint venture as to the sale of real estate makes the joint venturers joint owners of the real estate. *Such a contention must not only be made but it must be supported if appellant is to have any comfort from it.*"

(Emphasis supplied)

(3) See quotation under Questions Presented.

CONCLUSION

The Court would have to relax its rules and precedents to grant Petitioner a third day in Court. Respondent submits the writ should be denied.

WM. C. MCLEAN
707 Florida Avenue
Tampa, Florida
Attorney for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I mailed a copy of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari to Mr. Howard P. Rives, First Federal Building, Clearwater, Florida, as Attorney for Petitioner, by United States first class mail, postage prepaid, this —— day of July, 1958.

WM. C. MCLEAN

SUPREME COURT. U. S.

No. 150

IN THE

SUPREME COURT OF THE UNITED STATES

No. 16,720.

WILLIAM A. WEGMANN,
Petitioner,

vs.

NICKOLAS MANNINO *et al.*,
Respondents.

PETITION FOR REHEARING.

HOWARD P. RIVES,
First Federal Building,
Clearwater, Florida,
Attorney for Petitioner.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-8080

IN THE

SUPREME COURT OF THE UNITED STATES

No. 16,720.

WILLIAM A. WEGMANN,
Petitioner,

vs.

NICKOLAS MANNINO *et al.*,
Respondents.

PETITION FOR REHEARING.

Comes now Petitioner, William A. Wegmann, through Counsel of Record, pursuant to Rule 33 (2) of the Court and respectfully moves the Court to reconsider and grant re-hearing upon its Order denying certiorari in the above cause for the following grounds and reasons:

I.

The Supreme Court of Florida subsequent to the initial proceedings of this cause rendered a decision having vital effect upon this cause which ought to be justly considered by this Honorable Court before its final determination.

II.

That the case above referred to positively and with clarity indicates the error of the lower courts and supports the position of the Petitioner seeking review.

STATEMENT OF POINTS AND ARGUMENT.

Petitioner in the case at bar had entered into a contract in the State of New Jersey for services in development of Florida land. The Court below in construing the contract erroneously found that this contract required Petitioner to perform the services of a "real estate broker" which could be done only by licensed brokers and, notwithstanding proof of a *prima facie* case of breach of contract by Defendants, the Court has declared Petitioner not entitled to recovery. The contract involved consisted of three separate writings which were attached to Plaintiff-Petitioner's original Complaint as Exhibits "A", "B" and "C".

Exhibit "A" was the initial writing of the Plaintiff and Defendant (Respondent). Exhibit "B" was a subsequent written modification as was Exhibit "C". These documents completely revised the original contract writing.

The Lower Court over protest of Petitioner refused to construe Exhibits "B" and "C" as a part of the contract documents.

The Circuit Court of Appeals clearly shows this error in its opinion (A-3) when it stated:

> "Appellant does not cite a single Florida case to aid us in determining whether his contract is a contract which requires him to perform the acts of a real estate broker. *We must therefore look to the exact*

terms of the agreement and compare them with the language of the statute."

The opinion then proceeded to copy the duties of Appellant as set forth in Exhibit *"A" only. Absolutely* no consideration was accorded to the terms of Exhibit "B" or "C" which under time honored decisions of our State Court formed an integral part of the true contract.

It must be borne in mind that to sustain the Lower Court, the following question must be answered in the affirmative:

Does the contract *construed as a whole require* Petitioner to perform services as a real estate broker? Exhibit "B" provided:

> In accordance with our mutual understanding, you are the owner of A. B. C. Excavating Company, who holds title to a plot of ground in Dunedin, Florida, known as Harbor View Villas.
>
> Title to the aforementioned property is being transferred from A. B. C. Excavating Company, to you personally and thence from you, personally, to a New Jersey corporation known as Harbor View Villas, Inc.
>
> *This corporation, after doing certain improvements, etc., to said land is to sell the land in the form of lots to private individuals* and in accordance with a certain agreement existing between the aforementioned A. B. C. Excavating Company and myself, I am to be paid a certain percentage of the profit that is made from the sale of said property.
>
> Now this is to certify that our mutual understanding is that I am to wait for my percentage of the profit until such time as the aforementioned Harbor View Villas is sold to individual buyers.

> It is further mutually agreed upon by you and I that the original percentage of commission or remuneration to be received by me shall be based upon the original cost of the ground of $175,000.00, plus the cost of engineering, dredging, grading, excavating, street surfacing or paving and, conveyancing. When these costs are all accumulated into one total, that total is to be deducted from the accumulated sales of the aforesaid Harbor View Villas and, the difference between those two figures is the figure to be used in computing the percentage which is to be paid me for my services rendered, all of which, we, the undersigned agree and certify.
>
> (Signed) William A. Wegmann,
>
> (Signed) Nicholas Mannino.
>
> /s/ Leonard A. Spector.

As seen from the language of the Circuit Court opinion no dignity was accorded the true modified contract. Petitioner's brief cited the best authority previously available for the contention that a contract must be construed as a whole. Since the initial proceedings, an even stronger decision has now taken its place in the law of Florida in *Montgomery Roofing Company* v. *Howland*, 98 So. 2d 484. In this case the Supreme Court of Florida was squarely faced with a contract application far weaker than the case at bar, the facts being as follows:

> Contract was made for construction of a water treatment plant in Miami, Florida. Contractor made a sub-contract with Plaintiff to supply labor and material for ventilation equipment under a specific section of the general contract.
>
> The officer of the general contractor who made first sub-contract later made a second sub-contract with a third party dealing with portions of the ventilating equipment. First sub-contractor performed work alleged to be in first sub-contract and general contractor

asserted a right to deduction claiming work of second contract was embodied in duty of the first.

Florida Court held in its opinion 98 So. 2d 484, 486:

> "Here, the Plaintiff's sub-contract was, on its face, unambiguous; yet almost simultaneously with its execution, the same official executed on behalf of the defendant another contract of the same dignity, covering a portion of the exact work called for by the Plaintiff's contract. *Both contracts were part and parcel of the same general transaction, that is, the defendant's general contract job. While the situation does not fall strictly within the rule that where an agreement is evidenced by two or more writings, the writings must be construed together, it has been said that 'this rule is not necessarily confined to instruments executed at the same time by the same parties for the same purpose; instruments entered into on different days but concerning the same subject matter may under some circumstances be regarded as one contract and interpreted together.'* " 7 Fla. Jur., Contracts, Sec. 78, p. 144 (Italics supplied).

The section of *Florida Jurisprudence* cited provides:

> "Sec. 78—Construing Writings Together.
>
> When an agreement is evidenced by two or more writings, the writings must be construed together. This rule is not necessarily confined to instruments executed at the same time by the same parties for the same purpose; instruments entered into on different days, but concerning the same subject matter, may under some circumstances be regarded as one contract and interpreted together. Where a contract is embodied in several instruments, its true meaning is to be ascertained from a consideration of all the instruments and their effect upon each other. But where a variety of instruments form one transaction, the law will not give effect to any one instrument unless the whole transaction is completed."

In the cited case it is readily apparent that the Florida rule regarding contracts contained in several instruments must be construed together. Before closing the doors of justice on this petitioner the Court here should again consider Page Five (5) of Petitioner's Petition for Certiorari especially *Pensacola Gas Company* v. *Lotze*, 2 So. 609, holding:

> "One part of an agreement may be resorted to to explain the meaning of language or expressions of another part."

CONCLUSION.

The Court below has done violence to a cardinal rule of contract construction which patently shows to be an oversight.

The lower Court in reaching its decision positively showed that it considered the entire agreement to be vested only in Exhibit "A". If the Court below had considered Exhibit "B" it would have found that the parties modified the contract to provide for the formation of a corporation which was to sell the land viz.:

> "This corporation, after doing certain improvements etc., to said land is to sell the land in the form of lots * * * etc." (Exhibit "B" A-17, Petition for Certiorari.)

Upon consideration of Exhibit "B" the Court below then must find that Petitioner herein as President of the corporation which the parties contracted to form and did form was exempt from brokerage requirement under the express terms of the Florida Statute providing:

> "475.01 (2) * * * nor shall said terms be applied to one officer of every corporation engaged in the sale

of its own properties who shall be its president unless otherwise provided in its charter or by-laws, if said corporation shall not otherwise be classed as a real estate broker or a salesman."

The corporation which was formed squarely meets the exemption; the Petitioner and Respondents carefully followed the law of Florida in its formation. Substantial justice can only be done now by this Court in ordering a new trial and granting this Petition.

Respectfully submitted,

HOWARD P. RIVES,
First Federal Building,
Clearwater, Florida,
As Attorney for Petitioner.

CERTIFICATE.

As counsel of record for the Petitioner I certify that this petition is presented in good faith and not for delay and that it is restricted to stating grounds which are confined to intervening circumstances of substantial grounds not previously presented.

HOWARD P. RIVES,
First Federal Building,
Clearwater, Florida,
Attorney for Petitioner.

Office - Supreme Court, U.S.
FILED
JUN. 2 1958
JOHN T. FEY, Clerk

No. 150

IN THE

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT.

No. 16,720.

WILLIAM A. WEGMANN,
Appellant,

vs.

NICHOLAS MANNINO et al.,
Appellees.

PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF.

U. S. COURT OF APPEALS
FILED
MAY 9 1958
EDWARD W. WADSWORTH
CLERK

HOWARD P. RIVES,
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Clearwater, Florida,
Attorneys for Appellant.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

IN THE

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT.

No. 16,720.

WILLIAM A. WEGMANN,
Appellant,

vs.

NICHOLAS MANNINO et al.,
Appellees.

PETITION FOR REHEARING.

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

Plaintiff-Appellant above named, respectfully presents this Petition for Rehearing in the above styled cause and in support and justification therefor shows:

I.

The Court of Appeals in its opinion affirming the lower Court has clearly failed to recognize that the *Written Contract* of the parties consisted of not *ONE* document but *THREE* documents to-wit: Exhibits "A", "B", and "C" (Record pages 9, 15, 17).

II.

The Court has erroneously charged Appellant with failure to cite a Florida Case in support of "ownership through joint venture" (Opinion Page 8) by overlooking the Cited Florida Case of *Russell* v. *Thielin,* 82 So. 2d 143 (Original Brief of Appellant Pages 7 and 8), and said case is conclusive upon this Court under *Erie Railroad* v. *Tompkins.*

III.

The Court by its decision has failed to recognize the expressed exemptions from the terms of Section 475.01, exempting from registration one officer of every corporation engaged in the sale of its own properties.

Wherefore, upon the foregoing grounds, but without waiver as the other grounds as set forth in the original Brief, Petitioner respectfully urges that this Petition and its attending Brief be duly considered, granted and that the judgment appealed from be reversed.

Howard O. Rives

Of the Firm of
McMULLEN, RIVES & BASKIN,
First Federal Building,
Clearwater, Florida,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL.

I, Howard P. Rives, of the Firm of McMullen, Rives & Baskin, Attorneys for Appellant, William A. Wegman, do hereby certify that the foregoing Petition for Rehearing of this cause is presented in good faith and not for the purpose of delay.

Howard P. Rives

HOWARD P. RIVES.

BRIEF IN SUPPORT OF PETITION FOR REHEARING.

As to Ground One.

Both the District Court and now this Court have failed to recognize the fact that the Written Contract actually consisted of an original document, Exhibit "A" (Record 9), Exhibit "B" (Record 15) and Exhibit "C" (Record 17).

The Appellee does not dispute the statement of law that "where a contract consists of several instruments that the true intent and construction is to be gathered from the contract as a whole."

Obviously from the Court's opinion as written the Court has overlooked the essential written modifications referred to as Exhibits "B" and "C" above.

The importance of Exhibit "B" as a part of the Contract was mentioned in the Original Brief on Page 5 thereof and the specific language of such Exhibit is as follows:

EXHIBIT B.

> In accordance with our mutual understanding, you are the owner of A. B. C. Excavating Company, who holds title to a plot of ground in Dunedin, Florida known as Harbor View Villas.
>
> Title to the aforementioned property is being transferred from A. B. C. Excavating Company to you personally and thence from you, personally, to a New Jersy corporation known as Harbor View Villas, Inc.
>
> *This corporation, after doing certain improvements, etc., to said land is to sell the land in the form*

of lots to private individuals and, in accordance with a certain agreement existing between the aforementioned A. B. C. Excavating Company and myself, I am to be paid a certain percentage of the profit that is made from the sale of said property.

Now this is to certify that our mutual understanding is that I am to wait for my percentage of the profit until such time as the aforementioned Harbor View Villas is sold to individual buyers.

It is further mutually agreed upon by you and I that the original percentage of commission or remuneration to be received by me shall be based upon the original cost of the ground of $175,000.00, plus the cost of engineering, dredging, grading, excavating, street surfacing or paving and conveyancing. When these costs are all accumulated into one total, that total is to be deducted from the accumulated sales of the aforesaid Harbor View Villas and, the difference between those two figures is the figure to be used in computing the percentage which is to be paid me for my services rendered, all of which, we, the undersigned, agree and certify.

(Signed) William A. Wegmann
(Signed) Nicholas Mannino

/s/ Leonard A. Spector
(Italics supplied.)

It is apparent that the Court has been confused by the complexity of the Contractual Agreements and has adopted the view that the compensation of the Appellant was related to his sales of lots. Exhibit "C" to the Contract provided as follows:

EXHIBIT C.

April 7, 1955

Mr. Nicholas Mannino:

Dear Sir:

In confirmation of our verbal understanding as of 4-5-55 and 4-6-55, in compliance with your request that Harbor View Villas be listed with brokers in adjacent cities to Dunedin, Fla. and including Dunedin, Fla. and in accordance with your desire to pay brokers a commission in excess of the 5% which is the allowance made in my contract with you and or A. B. C. Excavating in and agreement made between us on the 27th day of February 1954, wherein and therewith you are excluded from making any agreement with any other individual pertaining to the development or sale of lots or any other part thereof it is mutually agreed between us herewith that you employ the assistance of such brokers and pay them commission or bonuses up to 15% with the expressed understanding than any commission or bonus paid to any such broker in excess of 5% will be charged to the general developing expense of Harbor View Villas development and not as a direct charge against my renumeration which I am to receive out of the profits made from the development of Harbor View Villas Subdivision.

The above is hereby agreed upon by:

(Signed) Nicholas Mannino

(Signed) W. A. Wegmann

Witness

/s/ Leonard A. Spector

It is the position of the Appellant that the overall Contract clearly indicates that the gross profit to be derived by Appellant for his services was 25% of Appellees' net profit for which payment, Appellant was to supervise the laying and platting of lots, digging of canals, installation of streets, water and sewer lines, establishment of sales force and general acts commonly found in development contracts.

Actually after paying commissions to brokers employed on the project, he was to receive as his net profit 20%, less advertising and general office expense which he might incur in his supervision of this development.

Exhibit "C" heretofore quoted makes this arrangement even more clear in that it is apparent that Appellee Mannino was desirous of paying bonuses and that through Exhibit "C" it was mutually recognized that these commission bonuses paid to brokers or salesmen would be considered as a general cost of the development with the exception of the original 5% allowance which had been set up as a part of appellee's gross profit figure.

The fact that 10% of the gross sales price of initial lot sales by the corporation was to be set aside as an operating fund for payment of advertising and sales expenses, must be construed with the related provision of the Contract wherein it was agreed that the remaining 15% of Appellant's gross profit would be withheld until development had been completely liquidated. Appellant contends that it is therefore quite obvious that he, individually, was not receiving or expecting a real estate commission but in

truth and in fact at all times, was operating on an agreement of joint venture, furnishing capital and know-how as the purchase price of his net 20% interest in the development.

As to Ground Two.

That the Court has erroneously concluded that Appellant's position relating to "Joint Venture" is unsupported by a Florida Case inasmuch as Appellant has specifically cited a parallel Florida Case of *Russell* v. *Thielin et al.*, 82 So. 2d 143, wherein the *Supreme Court of Florida expressly found* that Plaintiffs who were developers under similar circumstances to case at bar by reciting: "Thielin and Thierry being 'real estate developers' had no license to sell real estate for other owners and apparently for this reason executed an option agreement." (82 So. 2d 143, 144).

Appellant respectfully contends that the Court should again carefully read pages 6, 7 and 8 of the Brief and especially the factual recitation and analysis of *Russell* v. *Thielin*, as shown on page 8 of Appellant's Brief. It is readily apparent that the Supreme Court of Florida recognizes that in "Development Contract Cases" of joint venture that Sec. 475.01 is not applicable. As shown in the cited portions of the Brief every element necessary for joint venture is present, specifically including sharing of losses and the sharing of profits. The Court should therefore upon reconsideration rescind its finding that no case has been cited by Appellant; should take note that there is no case cited in Appellee's Brief which this in any manner

rescinds the effect of the Thielin Case as binding authority on this Court.

As to Ground Three.

The Court in its decision has failed to recognize in connection with Exhibit "B" to the Contract the expressed exceptions and exemptions to the operation of *Section 475.01* of the Florida Statutes relating to corporations, which provides as follows, to-wit:

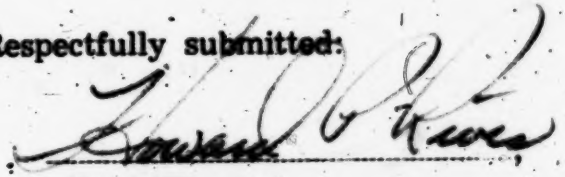
> "* * *; *nor shall said terms be applied to one officer of every corporation engaged in the sale of its own properties who shall be its president unless otherwise provided in its charter or by laws* * * *" (Italics supplied).

Appellant respectfully contends that in the reading of the overall contract it is readily apparent that the plan and contract of the parties was that the corporation, to-wit: Harbor View Villas, Inc., would sell the lots and that William A. Wegmann as president of the corporation was the officer entitled to such recognition as its president. In Exhibit "B" (heretofore set forth at length in this Brief, Page 4) it is shown that the corporation utilized by Wegmann and Mannino is parallel and comparable to the option theory approved by the Supreme Court of Florida in *Russell* v. *Thielin* heretofore cited. Appellant now respectfully urges that the opinion of the Court in its present form is an erroneous construction of the Florida Statutes and that the same now on rehearing should be corrected.

CONCLUSION.

Appellant respectfully submits in conclusion that rehearing of this cause should be granted; that the opinion as entered in this cause should be corrected and that Judgment reversing the decision of the lower Court and remanding this cause for new trial should be entered in lieu thereot.

Respectfully submitted:



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